

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

John W. Yeager, Referee.

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

STATEMENT OF CLAIM: Claim of the Terminal Board of Adjustment, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, that the Carrier violated the Clerks' Agreement:

(1) When it failed to assign extra or furloughed yard clerk, F. E. McCormick, to vacancy on the third shift, March 19, 1947, and assigned a junior employe to the vacancy.

(2) That Yard Clerk F. E. McCormick be paid a day's pay at the rate of the position to which the Carrier failed to assign him.

EMPLOYEES' STATEMENT OF FACTS: Extra or furloughed Yard Clerk McCormick, on completion of his tour as messenger at 3:00 P. M., March 19, 1947, was notified to report at 7:00 A. M., March 20, 1947, as extra yard clerk. After Yard Clerk McCormick had gone home, Yard Clerk V. E. Blackburn, regular occupant of third shift position at L.N.-B/4 connection, reported sick. This report was received at 4:00 P. M., March 19th, and therefore the Carrier had plenty of time to call Mr. McCormick to fill the vacancy, but ignored him completely and notified R. J. Fields, extra yard clerk junior to McCormick, to double over from his regular assignment as messenger on the second shift to the yard clerk vacancy on the third shift. The seniority dates of these men are as follows:

F. E. McCormick, messenger, seniority date, February 21, 1942; yard clerk seniority date, July 7, 1942.

R. J. Fields, messenger, seniority date, September 1, 1942; yard clerk seniority date, February 20, 1943.

Under date of March 21, 1947, Mr. McCormick filed claim for a day's pay with Mr. O. R. Moss, Agent, and copy of this claim is attached as Employee's Exhibit "A."

Reply from Mr. Moss, dated March 24, 1947, is attached as Employee's Exhibit "B."

Mr. McCormick's appeal to Local Chairman W. A. Perrin is attached as Employee's Exhibit "C."

Mr. Perrin's appeal to Mr. Moss is attached as Employee's Exhibit "D."

Reply of Mr. Moss is attached as Employee's Exhibit "E."

Appeal of Local Chairman Perrin, dated April 10, 1947, to the General Chairman is attached as Employee's Exhibit "F."

Service that would have been performed had the two men been used in their proper seniority turn.

F. E. McCormick

			1st Trick	2nd Trick	3rd Trick
Monday,	March 17		Relief day	.....	.....
Tuesday,	" 18		Yard Clerk \$8.95	.....	.....
Wednesday,	" 19		Messenger \$6.04	.....	Yard Clerk \$8.95
Thursday,	" 20		Off (worked 2 shifts previous day)		
Friday,	" 21		Messenger \$6.04	Yard Clerk \$8.95	.....
Saturday,	" 22		.....	Yard Clerk \$8.95	.....
Sunday,	" 23		Off (worked 6 days in week)		

R. J. Fields

			1st Trick	2nd Trick	3rd Trick
Tuesday,	March 18		Relief day	.....	.....
Wednesday,	" 19		.....	Messenger \$6.04	.....
Thursday,	" 20		Yard Clerk \$8.95	.....	.....
Friday,	" 21		.....	Messenger \$6.04	.....
Saturday,	" 22		.....	Messenger \$6.04	.....
Sunday,	" 23		.....	Messenger \$6.04	.....
Monday,	" 24		.....	.....	Yard Clerk \$9.14

The above statement shows that in either event Mr. McCormick would have worked four days as yard clerk at rate of \$8.95 per day and two days as messenger at \$6.04 per day, while Mr. Fields would have worked two days as yard clerk, one at rate of \$9.14 per day and one at \$8.95, and four days as messenger at \$6.04 per day during the week involved. Therefore, there would have been absolutely no difference in Mr. McCormick's earnings, leaving no basis for a claim. The General Chairman in his appeal to the director of Personnel, Exhibit D, states in part, "The statement made by Superintendent Miller in his letter of April 23, 1947, file 013-297 (Exhibit C), that there would have been no difference in Mr. McCormick's earnings had he worked the period involved is only an assumption on his part, * * *." The facts as shown in the foregoing very definitely support the Superintendent's statement and preclude any contention that it was merely an assumption on his part. The General Chairman, in this letter and also in his appeal to the Superintendent, Exhibit B, mentions the fact that Mr. McCormick worked more than six days in the following week. That can have no possible bearing on the case at issue because each week is a period in itself and the number of days employees may work in a given week is determined by the number of vacancies and the number of extra men available to fill those vacancies during that week. There were only six days' work available to each of the employees concerned during the week involved in the instant case and as there would have been no difference in the classification or rate of pay if the employees had worked as contended by the organization, no one suffered any loss, leaving no valid basis for a claim and it should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The claim here is one by the Organization in behalf of F. E. McCormick for a day's pay on account of the failure of the Carrier to assign McCormick to a temporary vacancy to which his seniority under the Clerks' Agreement entitled him. It is the claim that the assignment was given to a junior employee.

The facts are not in dispute. McCormick held seniority as messenger and in his assigned position as such he finished his tour of duty at 3:00 P. M., March 19, 1947. He also held seniority as an extra yard clerk. His seniority date as yard clerk was July 7, 1942. At the conclusion of his tour of duty at 3:00 P. M., March 19, 1947, he was notified to report at 7:00 A. M., March 20, 1947, for duty as extra yard clerk. At about 4:00 P. M., March 19, 1947,

a regular yard clerk, V. E. Blackburn, holding a third shift position, reported off duty on account of sickness. The starting time of this position appears to have been 11:00 P. M., March 19, 1947. Instead of calling McCormick for the assignment, one R. J. Field, likewise a regularly assigned messenger also having seniority as an extra yard clerk, was given the assignment. The seniority of Fields was junior to that of McCormick.

The Carrier admits that McCormick was entitled to the assignment on the basis of seniority and that a mistake was made in giving it to Fields and that this constituted a violation of the Agreement. In defense against a penalty for the violation it contends that McCormick received an equivalent amount of work and pay for the week involved to that which he would have received had the Agreement not been violated.

We think this may not be considered in defense of a penalty for the violation. The difficulty arises in arriving at a proper penalty to be imposed. No award has been cited exactly in point. Usually in previous awards there has been a demonstrable loss of earnings where there has been an assignment such as here, in violation of seniority, and in those situations the claim has been for such loss. Here it is not difficult to see that there could have been under other conditions a loss, but it so happened that none has been demonstrated.

This, we think, ought not to militate against some type of penalty. As was said in the opinion in Award 3301:

"The rights of the employe under the assignment are not satisfied merely by paying the employe the equivalent pay for working other hours at some other job. The hours and rate of pay are both involved."

It appears reasonable and proper to say under such circumstances as are disclosed here that a presumption of loss arises from the violation and that the Carrier should be required to respond with one day's pay for the position to which, in violation of the Agreement, it failed to call McCormick.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the claim has been sustained for one day's pay.

AWARD

Claim sustained as per findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 26th day of May, 1948.